

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

APPEAL FROM ORDER No 425 of 2003

For Approval and Signature:

HON'BLE MR.JUSTICE RAVI R.TRIPATHI

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1. Whether Reporters of Local Papers may be allowed : YES
to see the judgements?
2. To be referred to the Reporter or not? : NO
3. Whether Their Lordships wish to see the fair copy : NO
of the judgement?
4. Whether this case involves a substantial question : NO
of law as to the interpretation of the Constitution
of India, 1950 of any Order made thereunder?
5. Whether it is to be circulated to the concerned : NO
Magistrate/Magistrates, Judge/Judges, Tribunal/Tribunals?

JAY OIL MILL THRO' OWNER

Versus

GUJARAT ELECTRICITY BOARD

Appearance:

1. Appeal from Order No. 425 of 2003
MR NIRAV C THAKKAR for Appellant No.
MR NK MAJMUDAR for Respondent No. 1

CORAM : HON'BLE MR.JUSTICE RAVI R.TRIPATHI

Date of decision: 12/08/2004

ORAL JUDGEMENT

The appellant-original plaintiff has approached
this Court being aggrieved by order dated 01.04.2002
passed by the learned Civil Judge (Senior Division),

Khambhaliya below Exhibit 1 in Special Civil Suit No.18 of 1992 also and the order passed by the learned Civil Judge (Senior Division), Khambhaliya below Exhibit 23 in Misc. Civil Application No.12 of 2002 dated 22.10.2003. The Appeal From Order was filed on 13.11.2003. On 18.11.2003, notice was issued, returnable on 06.12.2003. On 09.12.2003 the Court was pleased to issue rule returnable on 10.12.2003, in Civil Application Mr.N.K. Majmudar, the learned advocate for the respondent waived service of rule. Thereafter, by order dated 12.12.2003 this Court admitted the matter and also granted interim relief in favour of the appellant, directing the respondent-Gujarat Electricity Board (hereinafter referred to as "the Board") to reconnect the power supply on payment of Rs.50,000/-. It was ordered that the amount of Rs.50,000/-, be paid within one week. It was also directed by this Court that the remaining amount of Rs.2,33,686/-, be paid in five equal monthly instalments.

2. When the matter came up for final hearing, Mr.N.K. Majmudar, the learned advocate appearing for the respondent-Board vehemently urged that the present Appeal From Order is not maintainable. In support of his contention he placed reliance on the following decision. A decision of the Honourable the Apex Court in the matter of B. Janakiramaiah Chetty Vs. A.K. Parthasarathi and others, reported in 2003 AIR Supreme Court Weekly 2148. A decision of the Rajasthan High Court in the matter of Sohanlal and another Vs. Devachand, reported in A.I.R. 1957 Rajasthan 11. A decision of the Honourable the Apex Court in the matter of Prakash Chander Manchanda and another Vs. Janki Manchanda, reported in 1987 GLH 66.

The fact that the notice was issued by this Court on 18.11.2003, returnable on 06.12.2003 and in response to that the learned advocate for the respondent caused his appearance on 09.12.2003 and thereafter, after hearing the learned advocates for the parties by order dated 12.12.2003 the Court admitted this Appeal From Order and granted interim relief in Civil Application No.8218 of 2003, the learned advocate for the respondent cannot urge and agitate that the present Appeal From Order is not maintainable because the learned advocate has not raised and pressed this contention at the time of hearing of this Appeal From Order for admission on 12.12.2003. This Court (Coram: K.M. Mehta, J.) has recorded in para 3 as under:

"I have heard Mr.N.C. Thakker, learned advocate for the appellant, at great length. I have also heard Mr.N.K. Majmudar on behalf of the Board.

I have also gone through the documents. In my view when the plaintiff has filed application for restoration, the learned Judge dismissed the suit on the ground of jurisdiction is completely without application of mind. In fact, there was no such issue. In view of this, the appeal requires to be admitted and it is admitted."

3. Mr.Thakkar, the learned advocate submitted that on 18.03.2002 when the suit was posted for hearing the learned Judge was pleased to adjourn the same to 06.04.2002, at the request made on behalf of the advocate of the appellant. But thereafter the date of hearing was preponed and the suit was heard on 01.04.2002. On 01.04.2002 the learned Judge was pleased to dismiss the suit. In order dated 01.04.2002 the learned Judge was pleased to record various grounds which led the learned Judge to dismiss the suit, such as, it is recorded in para 3 that,

"The issues have been framed at Exhibit 59 on 05.02.1997 and as such the plaintiff is bound to adduce the evidence, but he has failed and his right to adduce the evidence has been closed and the plaintiff has been permitted to adduce evidence and the order was passed below Exh.95 on 10.9.2001. Thenafter the plaintiff did not comply with the order of to pay the amount of costs of Rs.500/-, to the deft. . . . As the plaintiff has not paid amount of costs and further adduced any evidence."

4. Thereafter in next para which is numbered as para no.3 (supposed to be para 4), the learned Judge has recorded that,

"As such the plaintiff as well as the defendant have not produced any evidence the plaintiff and his L.A. Mr.K.H. Nathwani are absent the deft. L.A. Shri J.R. Kanani made submission to dismiss the suit and . . . hence considering all the facts, circumstances and settled position of law the suit could not be decree (sic., decreed) for want of evidence and therefore, I pass the following order in the interest of justice." (emphasis supplied)

5. Mr.Thakkar also pointed out that the learned advocate for the appellant, on coming to know about the aforesaid order, filed a Purshis Exhibit 108 on the next date, i.e. 02.04.2002, which read as under:

"Heard. As the suit came to be dismissed on 01.04.2002, the case could not be ordered to be taken on Board. The plaintiff has liberty to restore the suit by filing Misc. Civil Application if he thinks fit. Hence the application is hereby filed."

6. Thereafter, Misc. Civil Application No.12 of 2002 was filed which is dismissed by the learned Civil Judge (Senior Division), Khambhaliya by order dated 22.10.2002. Mr.Thakkar pointed out that, in that Misc. Civil Application the Court had framed an issue for its consideration to the effect that,

"Whether Special Civil Suit No.18 of 1992 of the applicant, which was dismissed for default on 01.04.2002 is liable to be set aside." (emphasis supplied)

The learned advocate pointed out that the learned Judge after considering the submissions of both the parties in the concluding para has observed that, 'taking into consideration the decision of the Honourable the Apex Court in the case of Punjab Ele. Board Vs. Ashwin Kumar, reported in 1997 (3) Supreme 615, the civil court has no jurisdiction to hear the suit, challenging the bill of the respondent-Board'. It is also observed in the said para that the applicant/ plaintiff shall approach the appellate authority, that in view of the fact that this Court has no jurisdiction to try the suit the same cannot be restored. The learned Judge has then recorded a finding that the order passed below Exhibit 1, by his predecessor is on the ground of, 'having no jurisdiction,' i.e. on a point of law, therefore, the suit is not required to be restored. Finally, the application is rejected.

7. Mr.N.K. Majmudar, the learned advocate invited attention of the Court to the provisions of Order IX, Rule 9 of the Code of Civil Procedure (hereinafter referred to as "the Code"), which reads as under:

"Decree against plaintiff by default bars fresh suit, -- (1) Where a suit is wholly or partly dismissed under Rule 8, the plaintiff shall be precluded from bringing a fresh suit in respect of the same cause of action. But he may apply for an order to set the dismissal aside, and if he satisfies the Court that there was sufficient cause for his non appearance when the suit was

called on for hearing, the Court shall make an order setting aside the dismissal upon such terms as to costs or otherwise as it thinks fit, and shall appoint a day for proceeding with the suit."

8. Mr.Majmudar contended that the plaintiff cannot file a fresh suit and he ought to have approached for setting aside, order dated 01.04.2002.

Rule 9 of Order IX refers to Rule 8, which provides for, 'procedure', where defendant only appears. Rule 8 of Order IX reads as under:

"Procedure where defendant only appears. -Where the defendant appears and the plaintiff does not appear when the suit is called on for hearing, the Court shall make an order that the suit be dismissed, unless the defendant admits the claim, or part thereof, in which case the Court shall pass a decree against the defendant upon such admission, and, where part only of the claim has been admitted, shall dismiss the suit so far as it relates to the remainder."

8.1 The case of the plaintiff is that on 18.03.2002 the matter was adjourned to 06.04.2002, but thereafter without any intimation to the learned advocate for the applicant the date was preponed and the matter was taken up for hearing on 01.04.2002. That being so, the suit could not have been dismissed under Rule 8 of Order IX of the Code. Because Rule 8 of Order IX of the Code will be applicable only when, 'the suit is taken up on the day fixed for hearing'. In this case it is contended and which is not denied by the respondent that on 18.03.2002 the suit was adjourned to 06.04.2002 and that it was preponed and was taken up for hearing on 01.04.2002. In that view of the matter, order dated 01.04.2002 deserves to be quashed and set aside.

9. As is pointed out by the learned advocate, after order dated 01.04.2002 was passed, on 02.04.2002, Exhibit 108 was filed on which the learned Judge passed an order, as under:

"The plaintiff has liberty to restore the suit by filing Misc. Civil Application if he thinks fit. Hence the application is hereby filed."

10. Thereafter on filing of Misc. Civil Application No.12 of 2002, after framing an issue to the effect that,

'Special Civil Suit No.18 of 1992 of the applicant, which is dismissed for default on 01.04.2002 whether that order is liable to be set aside'. The application is dismissed on the ground that the Court has no jurisdiction to decide such suit and therefore, the suit cannot be restored. In view of that, order dated 22.10.2003, also, deserves to be quashed and set aside. At this stage Mr.Thakkar, the learned advocate for the appellant vigorously requested that, 'status quo ante' be restored and the amount which is deposited by the appellant under order of this Court dated 12.12.2003 be ordered to be refunded with interest.

10.1 This request cannot be acceded, for the simple reason that it is on record that the appellate committee has already rejected the appeal of the appellant and the amount which is deposited, was as a condition precedent for getting the electric supply restored. Therefore, at this stage, there is no question of passing an order of refund, of the amount, which is deposited by the appellant.

10.2 Mr.Thakkar also prayed that the respondent-Board be directed to supply a copy of the decision of the appellate committee. This Court sees no reason as to why the respondent-Board should have withheld the decision of the appellate committee once it is already made known to the party. Therefore, the respondent-Gujarat Electricity Board is directed to supply a copy of the decision of the appellate committee within four weeks from the date of receipt of the copy of this judgement.

11. Mr.Thakkar also requested that taking into consideration the fact that the suit is of the year 1992, the same may be directed to be heard and decided as expeditiously as possible. The request being reasonable, the same is granted.

The learned trial Judge is directed to give priority to hearing of the suit and decide it as expeditiously as possible, but not later than 15.03.2005 and report the same to this Court. This direction is given on an assurance given by the learned advocates appearing in this matter before this Court that their counterparts will extend full cooperation to the learned Judge of the trial court, to see that the suit is disposed of in the aforesaid time frame and that they will not be seeking any avoidable adjournment.

12. In the result the Appeal From Order is allowed. Order dated 01.04.2002 passed below Exhibit 1 and Order

below Exhibit 23 in Misc. Civil Application No.12 of 2002 are quashed and set aside. Misc. Civil Application No.12 of 2002 is hereby allowed. The suit is restored to file which is to be disposed of as directed hereinabove.

(Ravi R. Tripathi, J.)

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